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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-50

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, et al.,

Appellants,

v.

JOHN C. MOE, Individually and in his Official Capacity as Sheriff in and for the County of Missoula, Montana, et al.,

Appellees.

On Appeal from the United States District Court for the District of Montana

APPELLEES' MOTION TO AFFIRM

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APPELLEES' MOTION TO AFFIRM

Appellees move the Court to affirm the portion of the judgment sought by Appellants to be reviewed on the ground that the question presented does not require further argument. In the alternative Appellees move the Court to note jurisdiction of the question presented by this appeal together with the questions presented by the Appellants in companion cause No. 74-1656, October Term, 1974, *John C. Moe, Individually and in his Official Capacity as Sheriff in and for the County of Missoula, Montana, et al., Appellants v. The Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, et al., Appellees, and The State of Montana, et al., Appellants v. The Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, et al., Appellees.*

I.

Appellants[1] seek review of a portion of the final judgment issued by the three-judge statutory court in the cigarette tax case, Civil No. 2145, (hereinafter *Moe*) upholding validity of certain statutes of the State of Montana requiring state taxes on sales of cigarettes made on the Flathead Reservation to non-Indian purchasers. Other portions of the decision of the same court in the *Moe* case and in the companion property tax case (Civil No. 74-40-M) are the subject of the appeal brought by Appellees herein in October Term, 1974, Cause No. 74-1656.

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[1] Appellants, plaintiffs in the Court below, are named as Appellees in the appeal in Cause No. 74-1656.

II.

The decision of the three-judge court, on the specific issue raised by this appeal, was correct.[2] The essential premises asserted by Appellants in support of their appeal do not withstand scrutiny. The state tax involved is not a tax upon the Tribes or upon Indians. Collection of the tax from non-Indians does not interfere with or even involve tribal self-government.

III.

The retail outlets at which cigarettes were sold were not operated by the Tribes but by individual Indians. (App. p. 40, 58-59).The plaintiffs are not licensed traders comparable to those in *Warren Trading Post v. Arizona Tax Comm'n,* 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965). Sales to non-Indians are not required (App. p. 53). Tribal self-government intended for protection by *Williams v. Lee,* 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed. 2d 251 (1959) simply is not involved.

The tax is not upon the Indian seller but upon the ultimate non-Indian purchaser (R.C.M. 1947, Section 84-5606.10,

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[2] The questions presented in the Jurisdictional Statement in appeal No. 74-1656 relate directly to the questions of claimed immunity of certain Indians on the Flathead Indian Reservation from state taxation. We respectfully refer the Court to the arguments presented in the Jurisdictional Statement in Cause No. 74-1656 in support of the alternate motion presented here.

App.p. 220). In this case Indian sellers purchased cigarettes from wholesalers which were in turn sold at retail without tax stamps affixed (App. p. 40). There was in fact no requirement that the Indian seller prepay the tax to the wholesaler when he purchased cigarettes for resale.

Sales to non-Indians without collection of the tax invites violation of criminal law by the non-Indian purchaser (R.C.M. 1947, Section 84-5608.18, App. p. 222). Neither *McClanahan v. State Tax Commission of Arizona,* 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973) nor any other decision of this Court suggests that such a result would find judicial acceptance.

CONCLUSION

Jurisdiction should be noted and the portion of the judgment below to which this appeal is directed should be affirmed. In the alternative probable jurisdiction should be noted and all issues in this appeal and No. 74-1656 should be set for argument.

Respectfully submitted,

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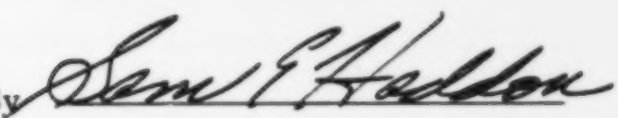
By 

Attorneys for Appellees

CERTIFICATE OF MAILING

I, SAM E. HADDON, one of the attorneys for Appellees certify that on the 6th day of August, 1975, I served three copies of the foregoing APPELLEES' MOTION TO AFFIRM on each of the counsel for Appellants herein by mailing true copies thereof, first class postage prepaid as follows:

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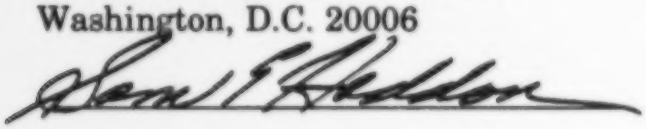

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